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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ANGEL CORTEZ, Defendant and Appellant.	2d Crim. No. B210198 (Super. Ct. Nos. MA037646, MA037668) (Los Angeles County)

Angel Cortez appeals the judgment entered after a jury convicted him of possession of a firearm by a felon (Pen. Code,[1] § 12021, subd. (a)(1)), possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), possession of a smoking device (Health & Saf. Code, § 11364, subd. (a)), three counts of making criminal threats (§ 422), assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), and false imprisonment by violence (§ 236). The jury also found true allegations that appellant was armed with a rifle during the commission of two of the charged counts of criminal threats (§ 12022, subd. (a)(1)).[2] In a bifurcated proceeding, the trial court found true the allegation that appellant had served a prior prison term (§ 667.5, subd. (b)). The

[1] All further undesignated statutory references are to the Penal Code.

[2] Appellant was also charged with forcible oral copulation (§ 288a, subd. (c)(2)) and two counts of forcible rape (§ 261, subd. (a)(2)). The jury acquitted appellant on the forcible oral copulation count, and was unable to reach a verdict on the forcible rape counts. The trial court thereafter dismissed the rape charges on the prosecutor's motion.

court sentenced him to a total term of 10 years in state prison. He contends (1) the court abused its discretion in denying his motion for a mistrial; (2) the court erred in failing to give CALCRIM No. 3500, the unanimity instruction; (3) the court violated its sua sponte duty to instruct on voluntary intoxication pursuant to CALCRIM No. 3426, or trial counsel provided ineffective assistance by failing to request the instruction; and (4) the gun use enhancement imposed on one of the criminal threat counts should be reduced from one year to four months. The People concede the last point, and we shall order the abstract of judgment amended accordingly. Otherwise, we affirm.

STATEMENT OF FACTS

Around January 2007, 17-year-old Roxanne S. met appellant at the Lancaster train station and exchanged telephone numbers with him. Over the course of the next few weeks, they stayed in contact by telephone and ate together once at a fast food restaurant. At about 3:15 p.m. on February 7, 2007, Roxanne finished her school day at the community college, called appellant, and asked if he could give her a ride to her volunteer job. After appellant picked her up in his car, his friend called and asked to borrow his car. Roxanne told appellant it would be okay with her as long as she got to her job by 4:00 p.m. Appellant picked up his friend, who dropped appellant and Roxanne off at appellant's house.

After Roxanne and appellant waited in the living room for about 15 minutes, appellant became angry and left the room. He returned with a rifle in his hand and repeatedly told Roxanne that she was going to feel what the person who took his car was going to feel. Appellant told Roxanne the rifle was loaded, and she believed he could fire it. Appellant also used a can of aerosol spray to make a blow torch. He told Roxanne he had a wire that he could use to cut people's tongues. He also told her that killing her would be too easy, that he wanted to torture and kill her, and that he knew where to dump bodies.

When Roxanne told appellant she would just go home on her own, he told her she could not leave. He also said that everything would be okay if she listened to him. On one or two occasions, he pointed the rifle at her head from about five feet away

and told her it was loaded. He also pulled his shirt over the barrel and told her it would silence the rifle when he shot it.

An hour or so later, two men returned in appellant's car. Appellant told Roxanne to answer the door, get his car keys, and not say anything. Roxanne complied, but did not leave because appellant told her not to and she was afraid of him. When appellant took the keys from Roxanne, she said she wanted to go home. Appellant pointed the rifle at her and told her to follow him into his bedroom. Roxanne sat on the bed while appellant sat on a bucket in front of her and started smoking crack cocaine. Appellant talked about breaking her bones, smashing her teeth out, and using a wrecking machine to smash her body. He referred to women as bitches and whores, and said he had ex-girlfriends who liked to be hit and choked. At one point, he talked to someone on the telephone and accused Roxanne of lying to him.

Appellant continued repeating the same things throughout most of the night. He also showed her a pair of pliers and told her he would squeeze her nipples off. He also thrust a knife at her. On three or four occasions, he said he wanted to torture her and was going to kill her. At times he appeared angry when he said this, yet other times he smirked and laughed.

At some point during the night, appellant allowed Roxanne to use the bathroom. She thought of escaping through the bathroom window, but it was too small. Over the course of the night, she repeatedly asked appellant if she could go home. Each time, he told her everything would be all right if she did what he said. He continued to smoke cocaine throughout the night and blew the smoke at Roxanne. Around the time Roxanne looked at appellant's cell phone and noticed it was 7:00 a.m., he told her that he was just "fucking around" and said he loved her and was not going to kill her.

Appellant started kissing Roxanne on the mouth. Although she was still scared, she told him she did not want to do anything with him and tried to push him away. After she twice told him "no," he slapped her and started choking her with both of his hands. Appellant got on top of her on the bed and she was unable to breathe. She struggled and tried to break free, but he continued choking her for about 40 seconds. He

then undressed both of them and proceeded to penetrate her with his finger and penis for about five to seven minutes. Roxanne did not do or say anything because she was afraid. He turned her over and continued having intercourse for another five to seven minutes until he withdrew his penis and ejaculated on her back. Roxanne got up and dressed herself and asked appellant if that was what he wanted. Appellant asked, "You didn't like it?" Roxanne cried and responded, "No."

Appellant told Roxanne that he wanted her to have sex with another man while he had sex with another girl. When Roxanne told him she did not want to do that, he responded that she was going to make money and said, "You dumb bitches. That's why you get hit, because you don't listen." As Roxanne sat on the bed crying, appellant told her to clean the house and led her into the kitchen. When Roxanne proceeded to mop the floor and clean the counters, appellant told her she was not doing it right and called her a bitch and a whore. He came up behind her and told her to go back to his bedroom as he pounded a baseball bat in his hand. Roxanne returned to the bedroom, where appellant pushed her onto the bed and choked her with both hands for about 45 seconds. Appellant told her she was turning purple, that her life was in his hands, and that she had been close to dying. As Roxanne caught her breath, appellant smoked more crack cocaine and said he wanted to torture and kill her. He also talked about knocking out her teeth and cracking her ribs.

At that point, there was a knock on the door. When appellant went to answer it, Roxanne ran outside through a sliding glass door and began yelling and screaming. Appellant grabbed her by the hair and pulled her back inside. She ran to the front door and opened it, but appellant was able to close it. During a struggle, appellant choked Roxanne and butted heads with her. Appellant told Roxanne that everything would be okay if she listened to him, and told her to go back to his bedroom. When Roxanne returned to the bedroom, appellant began talking again about killing and hurting her.

Appellant then repeatedly said, "Come on. Let's go." He handed her a knife and told her she could stab him if he "got out of hand." The two then left the house,

got in appellant's car, and drove to a convenience market in the Lancaster area. When appellant went inside, Roxanne got hysterical and unsuccessfully tried to summon help from the people in the car next to her. She then asked a store employee to help her and call 911. The employee nodded. A few minutes later, appellant came out of the store with two beers and something to eat and asked Roxanne if she wanted what he had brought her. She told him, "No." Appellant drove to a fast food restaurant and offered to buy her something, but she declined.

About 10 to 15 minutes later, appellant drove to a park. Roxanne was crying and hysterical. When appellant finished eating, he asked Roxanne if she wanted to go home. She said that she did. Appellant finally dropped her off at her house at about 5:30 p.m.

Roxanne called her foster mother on her cell phone and told her she had been raped and that appellant would not let her leave. Her foster mother told her they would "deal with it" when she got home, and did not tell her to call the police at that time. When Roxanne's foster mother got home at about 11:00 p.m., Roxanne was still upset and crying. The two of them talked for about 15 minutes.

The following morning, appellant called Roxanne at her house and asked her, "Are you still mad? . . . [W]hat's wrong?" Roxanne hung up on him. She called the police later that day.

Roxanne was very upset and cried intermittently as she recounted the details of the incident to the police who responded to her call. During the interview, she was able to give detailed information regarding the layout of appellant's house and various items she had seen there, including a rifle and a glass crack pipe. She also gave the deputies the knife appellant had given her and showed them where appellant lived. When she was examined at the hospital later that evening, she was observed to have injuries to her jaw line, neck, her right calf or shin, and her hairline, as well as abrasions to her cervix.

On February 10, 2007, several sheriff's deputies went to appellant's house to conduct a parole compliance check. During a search, a glass crack pipe with visible

residue was recovered from the bed in the master bedroom. In a linen closet just outside the bedroom, officers found a container holding what was later determined to be .29 grams of rock cocaine. Also found in the house were a .22-caliber rifle and a baseball bat.

When appellant was interviewed that same day by Detective O'Quinn, the detective noticed that he had several red marks and scratches on his neck and slight swelling on his forehead. During the interview, appellant admitting giving Roxanne the knife for protection against him. He also acknowledged that he struggled with Roxanne as she tried to escape through his front door, and that she had screamed as she tried to escape through the sliding glass door. He also corroborated Roxanne's account of what had happened in the kitchen, and admitted choking her. He said he could understand why Roxanne would have been afraid due to the "pumped-up" threats he made against her. He repeatedly apologized to the detective and said he had apologized to Roxanne for what he had done.

DISCUSSION

I.

Mistrial Motion

Appellant contends the court erred in denying the motion for a mistrial he brought after the prosecutor informed the jury that he had three prior felony convictions. We conclude the court acted well within its discretion in determining that a mistrial was unnecessary under the circumstances.

A.

Background

Prior to trial, appellant stipulated to the fact of three prior convictions as they related to the charge of possession of a firearm by a felon. Based on that stipulation, the court stated its intent to inform the jury that appellant had "a prior felony conviction, without the exact nature of that conviction coming in, unless and until [appellant] elects to testify." Later, as the prosecution was about to rest its case-in-chief, the prosecutor offered several stipulations. The prosecutor began by stating: "The first is, defense

counsel, do you stipulate that [appellant] was convicted of three felony convictions?" After the court clarified that the stipulation only applied to the charge of possession of a firearm by a felon, appellant's trial counsel responded, "Yes." The court thereafter accepted the stipulation. Following additional stipulations, the prosecution rested its case-in-chief and the jury was given a brief recess. During the recess, defense counsel complained that "now, obviously, I have it on the record, but to not make a bigger issue of it in front of the jury, but the People, basically, have introduced that my client has been a convicted felon not only once, not only twice, but three times. And I think that unduly, now, is going to put a prejudice on him and he is not going to receive now, I believe, a fair trial." Counsel requested a mistrial on that ground. The prosecutor responded that she had told defense counsel she wanted appellant to stipulate to all three convictions, and it was noted appellant had previously admitted the truth of all three convictions outside the presence of the jury.

The court denied the motion for a mistrial, but offered to instruct the jury that appellant "has a prior felony conviction" with regard to the charge of possession of a firearm by a felon alleged in count 1. Appellant's attorney complained the jury had already heard appellant had three felony convictions and might speculate as to the nature of those felonies. Counsel agreed, however, with the court's suggestion that the jury be informed of the nature of the three prior convictions. When the jury returned, the court stated: "Earlier, the People stipulated, and the defense agreed, that [appellant] has been convicted of three prior felony convictions. [¶] Now, whether it's three, whether it's one, that's simply irrelevant. The only relevant issue is that he has been convicted of a prior felony. That goes only to count 1, which is possession of a firearm by a felon. [¶] I just want to make sure that you understand that. And I want you to disregard the number 'three' for now. That's not the relevant inquiry. [¶] Now, . . . what I am going to do is just advise you of what charges he has been convicted of. I think it's important for you to know that. And [defense counsel], in fact, has requested that I do so." The court then proceeded to inform the jury that appellant's prior convictions were for evading a peace officer causing great bodily injury, in violation of Vehicle Code section 2800.3;

possession of a controlled substance, in violation of Health and Safety Code section 11350, subdivision (a); and evading a peace officer in violation of Vehicle Code section 2800.2, subdivision (a). The court concluded: "So I just wanted to let you know. I didn't want you to think that there was some, you know, heinous felonies. I didn't want you to think that maybe he had done something like this before. So now everything is out on the table. Okay? [¶] Thank you."

B.

Analysis

We review the denial of a mistrial motion for an abuse of discretion. (*People v. Valdez* (2004) 32 Cal.4th 73, 128.) The court must grant a motion for mistrial only when a party's chances of receiving a fair trial have been irreparably damaged. "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 573.)

The People assert that any error occasioned by the jury hearing appellant had three prior felony convictions was invited by his trial attorney's stipulation to that fact. We need not decide whether the doctrine of invited error applies because we conclude the court did not abuse its discretion in declining to grant a mistrial on the basis of the alleged error. Appellant simply fails to demonstrate that the disclosure of his three felony convictions necessarily deprived him of a fair trial. Instead, he merely notes that evidence of uncharged priors is inherently prejudicial (see *People v. Carpenter* (1997) 15 Cal.4th 312, 380, superseded by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107) and essentially argues that any error in admitting such evidence is reversible per se unless the prosecution presented "an open and shut case." That is not the law. While appellant acknowledges the court admonished the jury not to consider the evidence for the improper purpose he complains of, he overlooks our obligation to presume the jury understood and followed that admonishment. (*People v. Young* (2005) 34 Cal.4th 1149, 1214.) The jury also heard that the crimes appellant had been convicted of were relatively minor and dissimilar to

the charged crimes. Moreover, appellant's claim that the evidence of his priors necessarily led the jury to disregard any doubts it had as to his guilt is fatally undermined by the fact the jury did not convict him on all counts. Under the circumstances, the court did not abuse its considerable discretion in concluding that appellant's right to a fair trial could be preserved by informing the jury of the nature of the prior convictions and providing admonitions regarding the limited relevance of that evidence. (*People v. Avila, supra*, 38 Cal.4th at p. 573.)

II.

CALCRIM No. 3500

Appellant asserts the court violated its sua sponte duty to give the unanimity instruction, CALCRIM No. 3500.[3] He claims the instruction was necessary because the prosecution did not elect the acts upon which the assault, false imprisonment, and three counts of criminal threats were based.

The state Constitution guarantees criminal defendants a unanimous jury verdict on a specific charge. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) When a conviction on a single charge could be based on evidence of two or more discrete criminal acts, all jurors must agree that the defendant committed the same act. Unless the prosecution elects to rely upon a single criminal act, the trial court has a sua sponte duty to instruct the jury that it must unanimously agree beyond a reasonable doubt that the defendant committed the same specific act. (*Russo, supra,* at p. 1132; CALCRIM No. 3500.) A unanimity instruction is not required, however, where the evidence shows multiple acts in a continuous course of conduct. (*People v. Maury* (2003) 30 Cal.4th 342, 423.) "The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) "'[W]here the acts were substantially identical in nature, so that any

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3 The instruction provides in relevant part: "The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.' [Citations.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 93.)

The continuous conduct rule applied to the assault and false imprisonment charges. Appellant failed to offer a defense to any of the acts upon which those charges were based, and there was no reasonable basis for the jury to distinguish between them.

As for charges of making criminal threats, the prosecutor effectively elected the acts upon which two of the charges were based (counts 5 and 8) by adding allegations that appellant committed the crimes while armed with a firearm. During closing argument, the prosecutor also identified as the basis for counts 5 and 8 the two incidents Roxanne testified to in which appellant threatened her while armed with a rifle. The record also reflects that in the course of deliberations the jury asked the court to give the "rational[e] for count 8 vs. 5." With the agreement of counsel, the court responded "[i]t is up to the jury to decide if separate acts of Criminal Threats were made by the defendant during the course of the incident. Each separate act alleged must be proved beyond a reasonable doubt." This instruction sufficiently conveyed to the jury that each criminal threats count had to be based on distinct acts, each of which had to be proven beyond a reasonable doubt. With regard to the third criminal threats count, no unanimity instruction was required because the prosecutor identified multiple acts committed in what she accurately characterized as a continuous course of conduct.

In any event, any error in failing to give the unanimity instruction as to any of the counts was harmless. "The erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119, fn. omitted.) This is such a case. The record does not provide any rational basis, either by way of argument or evidence, for the jury to distinguish between the various acts appellant was alleged to have committed. Moreover, it is clear the jury resolved the basic credibility dispute against appellant and would therefore have convicted him of assault, false imprisonment, and making criminal threats based on any of the acts upon which

those charges could have been based. Any error in failing to give CALCRIM No. 3500 was therefore harmless beyond a reasonable doubt. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.)[4]

III.

CALCRIM No. 3426

Appellant contends his due process rights were violated by the failure to instruct on voluntary intoxication pursuant to CALCRIM No. 3426. He argues the court had a sua sponte duty to give the instruction, or his trial attorney was ineffective in failing to request it. There is no merit in either claim.

It is well settled that the voluntary intoxication instruction embodied in CALCRIM No. 3426 is a pinpoint instruction that need not be given in the absence of a request. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 670; *People v. Bolden* (2002) 29 Cal.4th 515, 559; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Moreover, it cannot be said that counsel's failure to request the instruction amounted to constitutionally ineffective assistance of counsel. In order to prevail on such a claim, appellant would have to establish not only that trial counsel's performance in this regard "fell below an objective standard of reasonableness . . . under prevailing professional norms," but also that appellant was prejudiced thereby. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Appellant fails to make either showing. Counsel may have had a legitimate tactical reason for failing to request an instruction that would focus the jury's attention on Roxanne's allegation that he had smoked crack cocaine, which appellant never conceded. Moreover, appellant fails to identify any evidence that he was under the influence of crack cocaine when he began committing the charged crimes, much less evidence that his intoxication had any effect on his ability to formulate the requisite intent. According to

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4 As the People recognize, there is a split of authority regarding the harmless error standard of review that applies to the failure to give a unanimity instruction. (Compare *People v. Thompson*, *supra*, 36 Cal.App.4th at p. 853 [applying federal constitutional standard of *Chapman v. California* (1967) 386 U.S. 18, 24], with *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [applying state law standard of *People v. Watson* (1956) 46 Cal.2d 818].) Since we find any error here harmless beyond a reasonable doubt, we need not decide which standard applies. (*People v. Napoles*, *supra*, 104 Cal.App.4th at p. 119, fn. 8.)

Roxanne, appellant's abusive behavior and criminal threats began before she observed him smoking crack. Even if appellant could demonstrate that counsel should have requested the instruction, it is not reasonably probable that the instruction would have led the jury to find that appellant lacked the requisite intent to commit any of the crimes of which he was convicted. His claim of ineffective assistance of counsel thus fails. (*Ibid.*)

IV.

Firearm Enhancement - Count 5

Appellant asserts the court erroneously imposed a consecutive one-year term for the armed with a firearm enhancement (§ 12022, subd. (a)(1)) found true as to count 5. He contends, and the People agree, that the term should be reduced to four months pursuant to section 1170.1, subdivision (a). The statute provides in relevant part that "[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." Because sentencing on count 5 was subordinate to the base term imposed on count 6, the term imposed for the section 12022, subdivision (a)(1) enhancement found true as to count 5 must be one-third of the one-year term indentified in the statute, i.e., four months. We shall order the judgment modified accordingly.

DISPOSITION

The judgment is modified to reflect a consecutive four-month sentence for the section 12022, subdivision (a)(1) firearm enhancement on count 5. As so modified, appellant's total state prison term shall be nine years four months. The trial court shall forward a modified abstract of judgment to the Department of Corrections and

Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Hayden Zacky, Judge

Superior Court County of Los Angeles

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

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